INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	14
Appendix A—Statutes and Executive Orders	15
B—Conflicting Opinion	24

CITATIONS

Cases:

Clark v. *Uebersee Finanz Korp.*, 332 U. S. 480	14
Cummings v. *Deutsche Bank*, 300 U. S. 115	10
Faber v. *United States*, 10 F. Supp. 602, certiorari denied, 296 U. S. 596	13
Gregg's Estate, 266 Pa. 189, 109 Atl. 777, certiorari denied, 252 U. S. 588	13
Guessefeldt v. *McGrath*, No. 10600, C.A.D.C., not yet reported	6, 8, 10, 24
Josephberg v. *Markham*, 152 F. 2d 644	12, 14
Kahn v. *Garvan*, 263 Fed. 909	12
Klein v. *Palmer*, 18 F. 2d 932	10
McGrath v. *Kristensen*, 340 U. S. 162	11
McGrath v. *Zander*, 177 F. 2d 649	13
Miller v. *Paul*, 237 Ill. App. 166	13
Miller v. *United States*, 11 Wall. 268	10
Noble v. *Great American Ins. Co.*, 250 App. Div. 773, 194 N. Y. Supp. 60, affirmed 235 N. Y. 589, 139 N. E. 746	13
Propper v. *Clark*, 337 U. S. 472	13
Salvoni v. *Pilson*, 181 F. 2d 615	13
Sarthou v. *Clark*, 78 F. Supp. 139	14
Schill v. *McGrath*, 89 F. Supp. 339	9
Shinsaku Nagano v. *McGrath*, 187 F. 2d 753	5
Silesian-American Corporation v. *Clark*, 332 U. S. 469	10
Stadtmuller v. *Miller*, 11 F. 2d 732	14
United States v. *Chemical Foundation*, 272 U. S. 1	10, 12, 13
United States v. *Krepper*, 159 F. 2d 958, certiorari denied, 330 U. S. 824	13
Vowinckel v. *First Federal Trust Co.*, 10 F. 2d 19	13
Wirtele v. *Grand Lodge*, 111 Neb. 302, 196 N. W. 510	13

Statutes and Executive Orders:

	Page
First War Powers Act, 1941, § 302, 55 Stat. 838, 840	9, 23
Joint Resolution of May 7, 1940, § 2, 54 Stat. 179	9, 23
Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. 501	9
Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*:	
§ 2	12, 14, 15
§ 2(a)	5, 6, 7, 15
§ 2(b)	15
§ 2(c)	15
§ 5(b)	9, 14, 16
§ 7(c)	12, 17
§ 9(a)	3, 5, 8, 9, 10, 12, 14, 18
§ 32	6, 10, 20
§ 39	5, 6, 7, 8, 9, 10, 21
War Claims Act of 1948, 62 Stat. 1246, *et seq.*, 50 U. S. C. App. 12, 2012:	
§ 12	7, 21
§ 13(a)	8, 22
Executive Order No. 9788, 11 F.R. 11981	3
Executive Order No. 8389, 5 F. R. 1400, 6 F. R. 2897, 2898, Sec. 5E(i)	9, 22

Miscellaneous:

55 Cong. Rec.:	
p. 4850	12
p. 4922	12, 13
p. 4926	12
Hearings, Senate Subcommittee of Committee on the Judiciary, on H.R. 4044, 80th Cong. 2d Sess.	9
Halleck, *International Law* (3d Ed. 1893) Vol. I, p. 401	9
Kennan, *Residence and Domicile* (1934), pp. 22-27	11
Moore, *Digest of International Law*, Vol. III, p. 273 (1906)	9
Vesting Order No. 813, Feb. 2, 1943	3
Wharton, *Law Lexicon* (14th Ed. 1938)	9

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 169

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

KAKU NAGANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 26, 1951.

OPINIONS BELOW

The opinion of the District Court (R. 33-37) is reported in 88 F. Supp. 897. The opinion of the

Court of Appeals (R. 54-65) is reported in 187 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1951 (R. 65). A timely petition for rehearing was denied on April 4, 1951 (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, notwithstanding the express provision of Section 39 of the Trading with the Enemy Act that no return shall be made of property of any national of Germany or Japan vested after December 17, 1941, such property may be returned, in a suit brought under Section 9(a) of the Act, to a Japanese national found not to be "resident within" Japan and not an "enemy" as defined in Section 2(a) of the Act.

2. If question 1 is answered in the affirmative, whether the allegations of the complaint bearing on respondent's residence are sufficient to establish that, despite her continuous residence within Japan from 1924 to 1950, she was not "resident within" enemy territory upon the outbreak of war.

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, as amended, and relevant Executive Orders, are set forth in Appendix A, *infra*, pp. 15-23.

STATEMENT

By Vesting Order No. 813, dated February 2, 1943, the Alien Property Custodian[1] vested in himself 8,780 shares of the common stock of the Fuji Trading Company, an Illinois corporation, as the property of the respondent Kaku Nagano, upon a finding that she was a national of Japan, a designated enemy country (R. 10-11).

On December 19, 1947, respondent filed in the District Court for the Northern District of Illinois (Eastern Division) a complaint under Section 9(a) of the Trading with the Enemy Act. She alleged, generally, that she was a permanent resident of the United States temporarily in Japan without having abandoned or having intended to abandon her domicile in the United States and that she was not an "enemy" or a "national of a designated enemy country" under the Trading with the Enemy Act (R. 2, 3). The following specific facts were alleged in the complaint: Respondent was born in Japan in 1892 and is a Japanese citizen (R. 2, 16). In 1914 she was married in Japan to Shinsaku Nagano, a native-born citizen of Japan who had been admitted to the United

[1] By Executive Order No. 9788, October 14, 1946, 11 F.R. 11981, the authority, rights, privileges and powers of the Alien Property Custodian were transferred to the Attorney General. The term "Custodian" will be used to indicate either official, as the context may require. The complaint was originally brought against Tom C. Clark, Attorney General. J. Howard McGrath, Attorney General, was substituted as defendant on December 22, 1949 (R. 33).

States for permanent residence in 1906 (R. 2, 5). A daughter was born to them in Japan in 1914 (R. 5). The following year, respondent was admitted to the United States for permanent residence (R. 5, 6), but the daughter was left in Japan in the care of respondent's mother (R. 6). In 1916, a son was born in Chicago (R. 6). In 1919 the Naganos and their son went to Japan and, while there, a second daughter was born (R. 6). Both daughters remained in Japan with respondent's mother while the parents and son returned to this country (R. 6). In 1924 the respondent, with her husband and son, again visited Japan (R. 6). This time, however, she remained in Japan, together with the daughters and the son, when the father returned to the United States (R. 6). Aside from a nine months' visit to the United States beginning in September 1932 (R. 7, 30-31, 49), respondent was in Japan with her children from 1923 or 1924 until 1950, when she again entered the United States (R. 49). Her husband visited her in Japan for several months each year after 1924, except for the period 1932-1933 and during the war (R. 7). Respondent's purposes in going to Japan in 1924 and remaining there were to provide a Japanese education for the son, then aged eight, and to make arrangements in Japan for the marriages of the daughters, then aged ten and four (R. 6).

The petitioner moved to dismiss the complaint

for failure to state a claim. (R. 28). The District Court granted the motion and dismissed the action. The court held that, even though respondent's legal domicile may have remained in the United States she was a person "resident within" Japan during the war under Section 2(a) of the Trading with the Enemy Act, and therefore an enemy ineligible to bring suit under Section 9(a) of the Act. Rejecting "the alleged family necessity relied on by [respondent] as an explanation for her long stay in Japan," the court held that "the facts alleged by [respondent] show that her residence in Japan was deliberate, whatever its motivation." (R. 35). The District Court relied solely on Section 2(a), and rejected the Government's alternative contention that Section 39, prohibiting returns to nationals of Japan, was a bar to recovery. (R. 33-38)

The Court of Appeals for the Seventh Circuit reversed, holding (1) that respondent was not "resident within" Japan inasmuch as, on the facts alleged, she had never intended to abandon her "permanent residence" in the United States; and (2) that Section 39 did not bar respondent's recovery.[2] (R. 54-65)

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[2] Shinsaku Nagano, the husband of respondent and a citizen of Japan, brought a companion suit under § 9(a) to recover, as his own property, 3,105 of the 8,780 vested shares. The court below, reversing the District Court, held the husband entitled to the 3,105 shares and directed the entry of judgment for him for the recovery of those shares. *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C.A. 7). The court did not pass on

REASONS FOR GRANTING THE WRIT

1. The decision below, in both its aspects, raises questions of substantial importance involving the construction and administration of the Trading with the Enemy Act.

(a) The ruling that Section 39, which in express terms bars return to German or Japanese nationals of property vested after December 17, 1941, does not apply to any such national who is a "friendly resident" of the United States is in direct conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Guessefeldt* v. *McGrath*, rendered May 3, 1951, No. 10600 (not yet reported). The full text of the *Guessefeldt* opinion is set forth in Appendix B, *infra*, pp. 24-30. The existence of a square conflict is explicitly recognized in the latter opinion, *infra*, p. 26.

(b) Similarly, the holding below that the allegations of the complaint, if true, are sufficient to establish that respondent was not "resident within" Japan during the war and hence not an enemy as defined in Section 2(a) is in conflict in principle with numerous decisions (cited, *infra*, p. 13, n. 7) holding persons "resident within" enemy territory without regard to their domicile. The holding

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the applicability of Section 39 as a bar to the husband's recovery. No review of that decision is being sought. The husband, as a citizen of Japan who was not present there during the war but was in the United States, is presumably eligible for an administrative return of his property under Section 32(a)(2)(D) of the Act (60 Stat. 50, 50 U.S.C. App. 32).

below also disregards the legislative history which clearly shows that "residence" was not intended by Congress to be synonymous with "domicile" and that while "resident within" as used in Section 2 may not have been intended to embrace a mere transient or one involuntarily detained, it was intended to include an individual who voluntarily chose to remain in an enemy country for more than transitory purposes, regardless of his intention to retain a legal domicile elsewhere. The decision below and other lower court decisions dealing with the "residence" question have cast a cloud of confusion upon the meaning of this provision of the Act. A large number of cases is now pending which involve construction of this term, and it is highly desirable that this Court should now resolve these uncertainties which handicap effective enforcement of the Act and unduly prolong litigation arising under it.

2. The decision of the court below is believed to be erroneous, both with respect to Section 39 and Section 2(a).

(a) *Section 39.*—That section (Appendix A, *infra*, p. 21) was added to the Trading with the Enemy Act by Section 12 of the War Claims Act of 1948, 62 Stat. 1246, 50 U.S.C. App. 12. It provides that no property of Germany or Japan or "any national of either such country" vested after December 17, 1941 (the effective date of the World War II vesting powers) "shall be returned to

former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." The War Claims Act also set up a commission to pass on claims of American internees and prisoners-of-war who had been mistreated by the enemy and to pay those claims out of the net proceeds derived from German and Japanese vested property "covered into the Treasury pursuant to the provisions of Section 39 of the Trading with the Enemy Act." Sec. 13(a), War Claims Act of 1948, 62 Stat. 1247, 50 U.S.C. App. 2012.

Although the court below recognized that Section 39, literally read, would, because of respondent's Japanese citizenship, bar a suit for the return of her vested property, it refused so to hold. Reasoning that the history of the Act prior to its amendment in 1948 shows a Congressional policy not to bar such recovery by a "friendly resident" and that the 1948 amendment prohibiting returns to Japanese and German nationals does not in terms amend Section 9(a), the court concluded that Congress intended, not to bar returns previously authorized under Section 9(a), but merely to designate Japanese and German vested property not otherwise recoverable as the source of the funds for the payment of war claims.

In the *Guessefeldt* case, however, the Court of Appeals for the District of Columbia Circuit construed Section 39, in accordance with its express

terms, so as to bar returns to *all* Japanese and German nationals, including even those who might previously have obtained returns under Section 9(a). The court noted that the amendment to Section 5(b) of the Act, which went into effect on December 17, 1941 (55 Stat. 838, 50 U.S.C. App. 5(b)), authorizes the vesting of property of *any* foreign national. Since Section 39 in specific terms prohibits a return of property vested after December 17, 1941, to nationals of Germany or Japan,[3] the court held that although nationals of countries other than Germany or Japan may still establish their claims under Section 9(a), nationals of the latter countries are precluded by Section 39 from doing so. It found support in the legislative history for its conclusion that Congress recognized that Section 39 applied to "nationals" of Germany or Japan, wherever resident and whether "friendly" or not. Hearings, Senate Subcommittee of Committee on the Judiciary, on H.R. 4044, 80th Cong., 2d Sess., pp. 197-198, 233, 234, 235, 255. See also *Schill* v. *McGrath*, 89 F.

[3] The word "national" as used in the Trading with the Enemy Act has been defined to include a citizen. Executive Order No. 8389, § 5E(i), 5 F.R. 1400. This definition has been twice ratified by Congress. § 2, Joint Resolution of May 7, 1940, 54 Stat. 179; § 302, First War Powers Act, 1941, 55 Stat. 838, 840.

Contrary to the intimation of the Court of Appeals in the Seventh Circuit, respondent is a "citizen" of Japan in the only sense in which the word has any meaning. If "national" means anything, it means "citizen." Wharton, *Law Lexicon* (14th Ed., 1938); Moore, *Digest of International Law*, Vol. III, p. 273 (1906); Halleck, *International Law* (3d Ed., 1893), Vol. I, p. 401; Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. § 501.

Supp. 339 (S.D.N.Y.) [4] The court also noted that not all nationals of Germany and Japan are denied a remedy under the Act. Section 32 (60 Stat. 50, as amended, 50 U.S.C. App. 32), which had been adopted in 1946 to relieve the stringency of the Act, authorizes discretionary administrative returns to certain specially designated classes of persons. Included in these classes are enemy nationals, even though residing within an enemy country, who were in fact denied the prerogatives of citizenship as a result of discrimination practiced by the enemy government. Section 32(a)(2)(C) and (D).[5] Section 32 is expressly excepted from the operation of Section 39.

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[4] The constitutionality of Section 39 was not argued before the Court of Appeals in *Guessefeldt;* hence the opinion of that court contains no reference thereto. The court in the instant case, however, indicated that the application of Section 39 to bar a return because of respondent's enemy citizenship would raise a serious constitutional question. We think it clear that the application of the vesting power to the property of an enemy national offends no constitutional limitation. *Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475; *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120; *Miller* v. *United States*, 11 Wall. 268, 305; *Klein* v. *Palmer*, 18 F. 2d 932, 934 (C.A. 2).

[5] Also included in the classes of persons who are ineligible to bring suit under Section 9(a) but who may qualify for return under Section 32 are (1) American citizens even though voluntarily residing within an enemy country, Section 32(a)(2)(C); and (2) nationals of occupied countries who became technical enemies by virtue of their residence within enemy territory, Section 32(a)(2)(C).

Enemy citizens, who were not present within enemy territory at any time between December 7, 1941 and March 8, 1946, the date of the enactment of Section 32, are also eligible to seek an administrative return (32(a)(2)(D)), e.g., respondent's husband, see note 2, pp. 5-6, *supra*.

(b) *"Resident Within"*—Respondent, a Japanese citizen by birth, was living in Japan on December 7, 1941, and in 1943 when her property was vested. On the day of Pearl Harbor, she had been living there uninterruptedly for almost twenty years, except for a nine-months' visit to the United States in the early 1930's. She was in Japan to educate her children and to arrange for the marriages of her daughters—a stay hardly involuntary and clearly not transitory. Yet the Court of Appeals, equating "resident within" to "domiciled", held that respondent was not "resident within" Japan since, on her allegations in the complaint, during the period 1915-1924 she had established a "permanent residence" in the United States, to which she intended to return.

The language of the Act does not warrant this result. As a matter of statutory usage it is well settled that "resident" may or may not mean "domiciled." See *McGrath* v. *Kristensen*, 340 U.S. 162, 175; Kennan, *Residence and Domicile* (1934), pp. 22-27. The legislative history of Section 2 is clear that "resident within" was not intended to mean "domiciled." When the original Act was debated in the 65th Congress, the specific question was asked whether "resident" meant "having acquired what we know as a legal residence, a domicile." Mr. Montague, Chairman of the Committee which reported the bill, replied:

> No, it does not. The word "residence" is much broader than the word "domicile". Domi-

> cile would give you perhaps the idea of permanency, of a legal habitat, but the word "resident" means a sojourner staying or residing in. It embraces domicile and is broader than domicile. [55 Cong. Rec. 4922.]

See also 55 Cong. Rec. 4850, 4926.

The holding of the court below, moreover, disregards the basic scheme of the Act. As it was drawn in 1917 and as it stands now, the Act authorizes the seizure of property belonging to an "enemy" (Section 7(c)), as that term is defined in Section 2, and provides a judicial remedy to a former owner who can establish that he is not a Section 2 "enemy" (Section 9(a)). The definition of "enemy" in Section 2 is framed on the hypothesis that the residence of the owner behind the enemy's lines puts his American property within the power of the enemy government. Accordingly, the owner, regardless of citizenship, is classed as an "enemy". *Kahn* v. *Garvan*, 263 Fed. 909, 915 (S.D.N.Y.). To weaken the enemy and to strengthen the United States, his property is made subject to seizure, and he may not recover it under Section 9(a). See *United States* v. *Chemical Foundation*, 272 U.S. 1; *Josephberg* v. *Markham*, 152 F. 2d 644, 648 (C.A. 2). Under this statutory scheme, what matters is whether the individual has placed himself within the enemy's territory

and within his power; his intention to retain a domicile in the United States is immaterial.[6]

To construe "resident within" to mean "domiciled" is to adopt almost the narrowest possible interpretation, and to restrict correspondingly the application of the Act, contrary to the settled rule of construction that the provisions of the Act for the seizure and disposition of enemy property should be liberally construed to effectuate the purposes they were enacted to subserve. *United States* v. *Chemical Foundation*, 272 U.S. 1, 10; *Propper* v. *Clark*, 337 U.S. 472, 481.[7]

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[6] It may be that a construction of "resident within" which embraces a mere transient or one involuntarily detained in enemy territory furthers the objectives of the Act no less than a construction which includes one remaining for more than transitory purposes. Congress, however, apparently meant to compromise between the exigencies and the hardships of war. The legislative history suggests that those under constraint were not intended to be included. See 55 Cong. Rec. 4922. But it does not follow that persons domiciled elsewhere were not to be included. The legislative history, discussed *supra*, shows quite the contrary.

[7] The lower courts have reached a diversity of results as to the construction of "resident within." In *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9), the court held that the term meant "domiciled" but it also held Vowinckel, as a Red Cross Surgeon, exempt from the Act in any event. In a number of cases, the courts have held persons "resident within" enemy territory without reference to the issue of "domicile." See, *United States* v. *Krepper*, 159 F. 2d 958, 966 (C.A. 3), certiorari denied, 330 U.S. 824; *Salvoni* v. *Pilson*, 181 F. 2d 615 (C.A.D.C.); *Faber* v. *United States*, 10 F. Supp. 602, 605 (Ct. Cl.), certiorari denied, 296 U.S. 596; *Miller* v. *Paul*, 237 Ill. App. 166, 168 173; *Wirtele* v. *Grand Lodge*, 111 Neb. 302, 304-305, 196 N.W. 510, 511; *Noble* v. *Great American Insurance Co.*, 250 App. Div. 773, 777, 194 N.Y. Supp. 60, 64, affirmed, 235 N.Y. 589, 139 N.E. 746; *Gregg's Estate*, 266 Pa. 189, 192-193, 109 Atl. 777, 778, certiorari denied, 252 U.S. 588. In others, the courts have held that persons constrained to remain within enemy territory were not enemies. See, *McGrath* v.

The court below also appears to misconceive the effect of the decision in *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480. It was there held that the effect of the amendment by the First War Powers Act of 1941 to Section 5(b) of the Trading with the Enemy Act (55 Stat. 838, 50 U.S.C. App. 5(b)) was to broaden (not to narrow) the Section 2 definition of "enemy" and so to widen the class of persons disqualified from suit under Section 9(a). Certainly, if the Section 2 definition of "enemy" based on residence is to be broadened in any respect, it cannot be limited to domicile, which is undoubtedly the most restrictive definition of residence.

3. As of March 31, 1951, there were 68 actions pending under Section 9(a) of the Trading with the Enemy Act in which individuals were plaintiffs. Of these 68 cases, 52 involved the construction of the phrase "resident within", 47 involved the application of Section 39 of the Act, and 39 involved both the construction of "resident within" and Section 39.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1951.

Zander, 177 F. 2d 649 (C.A.D.C.); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C.A. 2); *Sarthou* v. *Clark*, 78 F. Supp. 139 (S.D. Calif.); cf. *Josephberg* v. *Markham*, 152 F. 2d 644 (C.A. 2).

APPENDIX A

1. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 et seq:

* * * * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require,

may, by proclamation, include within the term "enemy."

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any

foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7. * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian,

or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or in-

terest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until

final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946] was present (other than in the service of the United States) in the territory of such nation or in any territory

occupied by the military or naval forces thereof or engaged in any business in any such territory * * *

* * * * *

SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

* * * * *

2. War Claims Act of 1948, c. 826, 62 Stat. 1246:

* * * * *

SEC. 12. The Trading With the Enemy Act of October 6, 1917, as amended, is hereby amended by adding at the end thereof the following new section:

"SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any

officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946."

SEC. 13. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the War Claims Fund. The War Claims Fund shall consist of all sums covered into the Treasury pursuant to the provisions of section 39 of the Trading With the Enemy Act of October 6, 1917, as amended. The moneys in such fund shall be available for expenditure only as provided in this Act or as may be provided hereafter by the Congress.

* * * * *

3. Executive Order No. 8389, 5 F. R. 1400, 6 F. R. 2897, 2898:

* * * * *

SEC. 5.

* * * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in,

or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order * * *

* * * * *

4. Joint Resolution of May 7, 1940, 54 Stat. 179:

* * * * *

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

5. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, APPELLANT

v.

J. HOWARD MCGRATH, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES, APPELLEES

Appeal from Judgment of The United States District Court for the District of Columbia

Decided May 3, 1951

Before EDGERTON, CLARK, AND PROCTOR, Circuit Judges.

CLARK, *Circuit Judge:* This is an appeal from the United States District Court for the District of Columbia. Appellant brought his suit in that court for the return of property vested pursuant to Section 5 (b) of the *Trading With the Enemy Act*, 55 Stat. 839, 50 U. S. C. A. App. § 5 (b).

The complaint states, *inter alia*, that the appellant was born in Germany in 1870 and that he is still a citizen of that country. The appellant has been a resident of Hawaii since 1896, but he is not a citizen of the United States. The complaint alleges that he was present in Germany between April 1938 and July 1949, but that his stay in Germany after the outbreak of World War II was in-

voluntary. It is further alleged that the appellant committed no act hostile to the interests of the United States during the enforced stay.

The Attorney General moved to dismiss the complaint on the ground that the appellant's German citizenship, without more, disqualifies him from recovery under the Act. The District Court so held, and the basis of that decision was Section 39 of the Act, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39, which declares in part:

> "No property or interest therein of Germany, Japan, *or any national of either such country* vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." (Emphasis supplied.)

The appellant brings this suit under Section 9(a) of the Act, 42 Stat. 1511, 50 U. S. C. App. § 9(a). The lower court decided that the appellant would be entitled to the return of this property under that section of the *Trading With the Enemy Act*, *supra*, except for Section 39 of the Act. *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. (2d) 649 (1949) which affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. (2d) 732 (C. C. A. 2, 1926).

The issue before us then is simply this, has Section 39 of the Act, which prohibits return of World War II vested property to a national of Germany, prevented recovery of such property by a German

citizen. We must conclude that the present law precludes a recovery. Although we can sympathize with the situation in which the appellant finds himself, the statute is quite specific. Concededly the appellant is and always has been a German citizen, and a citizen is necessarily a national of the country of which he is a citizen (here Germany). See *Miyuki Okihara* v. *Clark*, 71 F. Supp. 319 (D. C. Hawaii 1947), and Executive Order 8389, Section 5 E (i), 5 Fed. Reg. 1400 (1940), as amended by Executive Order 8785, 6 Fed. Reg. 2897 (1941). Executive Order No. 9193, Section 10(a) 7 Fed. Reg. 5205 (1942) incorporates the definition of the term "national" as used in Executive Order 8389, *supra*. Consequently, Section 39 operates as a complete bar to the appellant's suit.

The appellant has called to the attention of this Court the opinion by Judge Lindley of the Seventh Circuit in *Nagano* v. *McGrath*, U. S. Court of Appeals for the Seventh Circuit, February 26, 1951.

The facts, we must conclude, are almost identical, but we regret that we cannot reach the same ultimate conclusion. The Court of Appeals for the Seventh Circuit has nonetheless, to a large extent, anticipated our decision. There, our brethren, speaking through Judge Lindley, said:

> "Therefore, by Act of Congress, the word 'national' as defined in the Executive Orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that such plaintiff may not recover her property even though

Section 9(a) giving her right of action has not been expressly repealed."

The Seventh Circuit did not believe that this result was anticipated by the nation's Legislature when it determined "Congress * * * has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, non-enemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none." With this proposition we can only agree in part, as the remainder of this decision will disclose.

To a large extent in the *Nagano Case, supra,* the Seventh Circuit based its opinion on the proposition that Congress did not intend to repeal Section 9(a) which provides for the return of the property heretofore vested. We quite agree. If Congress had intended to completely repeal Section 9(a) it would have so declared. So far, however, as Section 39 is in irreconcilable conflict with Section 9(a), it must be deemed to have superseded Section 9(a). *Henderson* v. *Washington-Marlboro and Annapolis Motor Lines,* 77 U. S. App. D. C. 26, 132 F. (2d) 729 (1942), Cert. den., *Washington-Marlboro and Annapolis Motor Lines* v. *Henderson,* 63 S. Ct. 853, 318 U. S. 779 (1943).

Under Section 5 (b) property of "any foreign country or national thereof" can be vested. Section 9(a) provides for the return of property to "any person not an enemy or ally of [an] enemy." Enemy as defined in Section 2(a) 40 Stat. 411, 50 U. S. C. App. 62, is "Any individual * * * resident within the territory * * * of any nation with which the United States is at war * * *."

Section 39 does not speak in terms of enemy or an ally of an enemy, but on the contrary it returns to the standard of "nationality." That section declares that no return shall be made to "Germany, Japan, or any national of either such country," if it has been vested. It should be quite apparent that Section 5(b) permits the property of all nationals of foreign countries to be vested, but Section 39 only prohibits return to nationals of Germany or Japan. There is then a group of nationals of foreign countries other than Germany and Japan who may still prove their claims under Section 9(a) if they were not enemies or allies of enemies under Section 2(a). Understandably Congress did not intend to repeal Section 9(a) in its entirety, but a very large restriction is imposed on that provision by Section 39.

Section 39 was enacted as part of the *War Claims Act* of 1948, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39; it is a statute which provides compensation to certain classes of United States nationals who suffered at the hands of the Germans or the Japanese during World War II. Among the principal beneficiaries of the law are American internees and prisoners of war who were the victims of maltreatment while held by the enemy. In Section 13(a) of the *War Claims Act of 1948*, 62 Stat. 1247, 50 U. S. C. A. App. § 2012, it is provided that the source of funds for the payment of these claims shall be the net proceeds derived from German and Japanese vested property withheld under Section 39 of the *Trading With the Enemy Act*. In short, the Congress believed that all enemy assets should be assembled for the purpose of gratifying

the claims of American nationals which arose out of enemy actions. By this provision Congress intended to institute a policy of non-return and non-compensation. H. R. 976, 80th Cong. 1st Sess., pp. 2-3 (1947).

In line with the policy of non-return and non-compensation Congress was aware that the term "national" as used in Section 39 would take in nationals wherever resident and regardless of their personal disposition toward the enemy. See Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 80th Cong. 2d Sess., on H. R. 4044, p. 233. When the bill came to the floor of the House of Representatives, Congressman Cox recognized that the criterion of nationality left no room for distinguishing between the friendly and the unfriendly enemy nationals 94 Cong. Rec. 551. It seems perfectly clear to us then that Section 39 of the *Trading With the Enemy Act* was intended to apply to all German and Japanese nationals living in the United States or elsewhere whose property had been vested. *Shill* v. *McGrath,* 89 F. Supp. 339 (S. D. N. Y. 1950).

But even friendly nationals of Germany or Japan are not barred from *all* relief under the *Trading With the Enemy Act.* Section 32 of the Act empowers the President to make discretionary administrative returns of World War II vested property to various specially designated classes of persons; Section 32 was specifically exempted from the rigorous effect of Section 39, *Shill* v. *McGrath, supra.* But as we held in *McGrath* v. *Zander, supra,* the right of return under Section 32 is ad-

ministrative and discretionary, and there is no right to review the judgment of the administrative authorities. Consequently the judgment of the lower court is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 169

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

KAKU NAGANO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD R. JOHNSTON,
C. LYSLE SMITH,
JOHN ALDEN POWERS,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument:	
I. There is no conflict of decision between circuits	8
1. On issue as to Section 39	8
2. On issue as to "residence within"	10
II. The decision below is clearly correct	11
1. On issue as to Section 39	11
(a) Functions of Section 39	12
(b) Language of Section 39	15
(c) The legislative history	17
2. On issue as to "residence within"	17
III. There is no important question of Federal Law	22
Conclusion	23
Appendix—Statutes and Executive Orders	App. i

CITATIONS.

Cases.

Becker v. Cummings, 296 U. S. 74, 79 (1935) 15
Central Trust Co. v. Garvan, 254 U. S. 554, 566 (1920). 15
Clark v. Uebersee Finanz-Korporation, 332 U. S. 480, 486, 487 (1947) 16
Clark v. Uebersee Finanz-Korporation, 158 F. 2d, 313, 315 (C. A. D. C. 1946) 12n
Faber v. United States, 10 F. Supp. 602 (distinguished) 22n
Guessefeldt v. McGrath, 89 F. Supp. 344, 347, 348, (D. C. D. C., 1950) 9, 10
Guessefeldt v. McGrath, ... F. 2d ..... (C. A. D. C., 1951), pending on petition for writ of certiorari, in the Supreme Court of the United States, October term, 1951, No. 204 ..... 8, 17n, 20
Hertz v. Woodman, 218 U. S. 205, 216, 217 (1910) 9
Lamar v. Browne, 92 U. S. 187, 196 (1875) 12n
Markham v. Cabell, 326 U. S. 404, 410 (1945) 9
McGrath v. Zander, 177 F. 2d 649, 652 (C. A. D. C., 1949) 8, 11, 17n, 18, 20, 21
Miller v. Paul, 237 Ill. App. 166 (distinguished) 22n
Miller v. Sinjen, 289 Fed. 388, 395 (C. C. A. 8th, 1923). 18, 20
Shinsaku Nagano v. McGrath, 187 F. 2d 753, 755 (C. A., 7th, 1951) 4, 14n, 19
Shinsaku Nagano v. McGrath, 88 F. Supp. 897 (D. C. Ill. 1949) 1
Sarthou v. Clark, 78 F. Supp. 139, 142, 145 (D. C. Cal., 1949) 18, 20, 21
Stadtmuller v. Miller, 11 F. 2d 732, 738 (C. C. A. 2d, 1926) 11, 18, 20
United States v. Krepper, 159 F. 2d 958 (C. A. 3rd, 1946) (distinguished) 22n

Vowinckel v. First Federal Trust Co., 10 F. 2d 19 (C. C. A. 9th, 1926) 18, 20
Wirtele v. Grand Lodge, 111 Neb. 302 (distinguished). 22n

Statutes.

Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. 201 et seq. 5
Resolution of Congress Terminating War with Germany, July 2, 1921, 42 Stat. 105-107 13
Settlement of War Claims Act of 1928, March 10, 1928, 45 Stat. 254-279 13
Trading with the Enemy Act of October 6, 1917, as amended:
Section 2(a) ..... 12, App. i
Section 5(b) ..... 12, App. i
Section 9(a) ..... 8-17, App. i
Section 12 ..... 13, 15, App. ii
Section 32(a) ..... 13, 15, App. ii
Section 39 ..... 8-17, App. iii
Title, 1 U. S. C. A. 109 ..... 9, App. v

Executive Orders.

Executive Order 8389, as amended ..... App. iii
Executive Order 9095, as amended ..... App. iv

Texts.

Sutherland on Statutory Construction, 3rd Ed. (1943) Vol. 2, Secs. 2201, 2212 10